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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 393

WAGONER TRANSPORTATION COMPANY, et al.
Petitioners

vs.

ARCHIE BAIRD, et al.
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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July 9, 1970

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, Wagoner Transportation Company and Harold Wagoner, respectfully pray that a writ of certiorari issue to review the judgment against petitioners and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on April 17, 1970.[1]

OPINION BELOW

The opinions of the District Court, not yet reported, appear in full in Appendix A of this petition. The opin-

1 The respondents are Archie Baird, Herman Bushman, L. Daugherty, Lawrence Giestel, Clinton Keller, Ralph H. Lang, Jerry Lantz, Howard Leverence, Robert E. Leverence, J. M. Ludlow, Lyle G. MacKintosh, John J. Miedema, Eugene Neal, Earl N. Puckett, Paul R. Rogers, Elmer Swanstrom, Gordon Thompson, Robert M. Van Gieson and Floyd Wolcott.

ion of the Court of Appeals, not yet reported, appears in full in Appendix B of this petition.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit, which petitioners seek to have reviewed, was entered on April 17, 1970, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether respondents, as truck drivers engaged in transporting wholly within Michigan petroleum products of Standard Oil Co. that were carried by lake tanker from Standard's refinery in Indiana to a marine terminal of Standard in Michigan for delivery via tank trucks driven by respondents to Standard bulk plants, service stations and customers in Michigan, were within the exemption from the overtime provisions of the Fair Labor Standards Act contained in §213(b)(1) of said Act for employees "with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service" on the ground they were performing part of a continuous interstate movement of such products.

2. Whether respondents, as truck drivers subject to being assigned at any time to drive trucks from Indiana to Michigan to transport petroleum products that their motor carrier employer is authorized and holding itself out to transport under a Certificate issued to it by the Interstate Commerce Commission, are within the exemption from the overtime provisions of the Fair Labor Standards Act contained in §213(b)(1) of said Act.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, (29 U.S.C. §201, et. seq.) are as follows:

United States Code, Title 29:

§207:

(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in any enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

§213:

(b) The provisions of section 207 of this title shall not apply with respect to —

(1) Any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49 . . . . . [2]

The pertinent provisions of the Motor Carrier Act of 1935, Part II of the Interstate Commerce Act, (49 U.S.C. §301, et. seq.) are as follows:

United States Code, Title 49:

§303:

(a) As used in this part —

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[2] The Department of Transportation Act, effective April 1, 1967, substituted "Secretary of Transportation" for "Interstate Commerce Commission" in this Section of the Fair Labor Standards Act. [Section 8(e) Pub. L. 89-670; 80 Stat. 943].

(10) the term "interstate commerce" means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express or water . . . .

(14) the term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes . . . .

§304:

"(a) It shall be the duty of the Commission

(1) to regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."[3]

STATEMENT OF THE CASE

This is an action instituted by some of the truck drivers employed by petitioner, Wagoner Transportation Company (hereinafter "Wagoner") to recover overtime com-

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[3] The Department of Transportation Act, effective April 1, 1967, transferred to the Secretary of Transportation all powers of the Interstate Commerce Commission under this section to the extent that they relate to qualifications and maximum hours of service of employees and safety of operation and equipment [49 U.S.C. §1655(e) (6) (C)]

pensation alleged to be due and owing them under the Fair Labor Standards Act, 29 U.S.C. 207(a)(1), together with an additional equal amount as liquidated damages plus a reasonable attorney's fee. The jurisdiction of the District Court below was invoked because a question arises under a law relating to commerce, the Fair Labor Standards Act.

The parties stipulated that the overtime provisions of the Fair Labor Standards Act applied unless respondents were within the exemption contained in 213(b)(1) of Title 29 of the United States Code for "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 304 of Title 49." See p. 2a, Appendix A. It was also stipulated that respondents were not paid overtime for the first 8 hours worked in excess of 40 hours per week but were paid at the time-and-a-half rate for hours worked in excess of 48 hours per week in accordance with the union agreement in effect during the period involved. See p. 1a, Appendix A.

The case was tried without a jury and the facts were uncontested. The pertinent facts are as follows:

Wagoner is a motor carrier engaged in transporting petroleum products, in bulk, for a subsidiary of Standard Oil Company of Indiana (hereinafter "Standard"). During the period in issue, March 23, 1964 to November 15, 1967, respondents were employed by Wagoner as truck drivers and were engaged in transporting petroleum products from Standard's marine terminal at Muskegon, Michigan to Standard bulk plants, service stations and customers in western Michigan. (T 2, 8-15, 65, 74, 75).[4]

The products transported by respondents were shipped via lake tanker from Standard's refinery at Whiting, Indiana to its Muskegon terminal approximately once a week. (T 48) There were no sales of products made at the Muskegon terminal. (T 62, 63) The function of the Muskegon

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4 Figures in parentheses preceded by "T" are page numbers of typewritten certified transcript of the proceeding before the District Court.

terminal was to change the mode of transportation from lake tanker to tank trucks. (T. 58-60)

70% to 75% of the total gallonage was moved through the Muskegon terminal to 70 bulk plants owned and operated by Standard and 77 service stations, 70 of which are either owned by Standard or leased to it. Standard keeps the tanks at these 70 service stations full and owns the product until it is sold to a consumer. The other 25% to 30% was shipped to the Muskegon terminal for delivery to direct shipment customers that Standard sold to on an annual contractual basis. (T. 49, 50, 71-81, 97, 114, 115)

A bulk plant, service station or customer was not supplied by lake tanker and tank truck through the Muskegon terminal unless Standard had first determined that this was the most economical way to ship its products to such bulk plant, service station or customer. (T. 56, 57, 117) As a result, Standard always knew, prior to making a shipment from its refinery at Whiting, what bulk plants, service stations and customers were to be supplied with products by that shipment. See pp. 16a and 19a, Appendix B.

The volume and type of products shipped from Standard's refinery to its Muskegon terminal were based upon monthly forecasts determined by computer on the basis of the requirements of its bulk plants and service stations, contractual commitments and prior sales experience. (T. 48, 49, 54, 106; 107) While the market fluctuated a few gallons, Standard knew, when a tanker shipment was made, that this was how much it was going to deliver from its Muskegon terminal. (T. 102) Standard's forecasts were sent to Wagoner so that it would have sufficient tank truck equipment available to continue the movement of products to Standard's bulk plants, service stations and customers. (T. 65, 66)

Wagoner holds a Certificate of Public Convenience and Necessity issued to it by the Interstate Commerce Commission, which authorizes, among other operations, the transportation of petroleum products from Granger, Indiana to points in Michigan. (T. 122, 123) Standard has a pipe line terminal at Granger, Indiana. Prior to the

period involved in this case, Wagoner transported Standard products from Granger to an area in Michigan formerly supplied from Muskegon. That operation stopped when Standard put on its own company trucks. (T. 82, 83) Wagoner, however, has continuously held itself out to perform this service and had it been successful in obtaining shipments from Granger to Michigan, it would have used any of its Muskegon drivers for such interstate trips. (T. 83, 84, 123-125, 168-173)

The District Court held that the products involved "came to rest when they arrived in Muskegon" and "lost their identity in the marine terminal facility," that Wagoner "was not engaged in interstate commerce and subject to I.C.C. regulations under the exception provided by Section 213(b)(1) of Title 29" and that respondents were entitled to recover overtime back pay of $31,531.00 and counsel fees of $12,500.00, but denied respondents' claim for liquidated damages. See pp. 6a-9a and 12a, Appendix A. The Court of Appeals held, in short, that respondents were not engaged in "interstate commerce" as defined in the Motor Carrier Act, see pp. 20a and 23a, Appendix B, and that possession of an interstate Certificate by Wagoner gave the Interstate Commerce Commission no power over respondents so as to exempt them from the Fair Labor Standards Act. See pp. 22a and 23a, Appendix B. The Court of Appeals denied respondents' cross-appeal for liquidated damages and affirmed the judgment of the District Court. See p. 23a, Appendix B. The Judgment of the Court of Appeals against petitioners appears in Appendix B hereto commencing on page 23a.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With Decisions Of Other Courts Of Appeals And This Court

The Fair Labor Standards Act (hereinafter "FLSA") provides that any employee who "is engaged in commerce or in the production of goods for commerce" shall be paid one and one-half times his regular hour wage for every hour worked over 40 hours in any work week, 29

U.S.C. §207(a)(1). Title 29 U.S.C. §213(b)(1), however, exempts from these overtime provisions "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service" under the Motor Carrier Act, 1935 (hereinafter "MCA"). The Commission's power extends to employees of common carriers by motor vehicle engaged in "interstate commerce," which is defined in the MCA as follows:

> "commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce move wholly by motor vehicle or partly by motor vehicle and partly by rail, express or water. 49 U.S.C. §303(a)(10)"

The Sixth Circuit has here held that "while the parties have stipulated that they are engaged in 'interstate commerce' for the purposes of the FLSA. . . ." the respondent drivers ". . . were not engaged in 'interstate commerce' as defined by the MCA," pp. 17a and 20a, Appendix B, and found that the District Court properly concluded that respondent drivers . . . . "were engaged in transportation which was wholly intrastate in character as defined by the MCA." See p. 23a, Appendix B.

In so holding, the decision of the Sixth Circuit in this case is in direct conflict with the decision of the Fifth Circuit in *Galbreath v. Gulf Oil Corporation*, 413 F.2d 941. *Galbreath* involved a distribution of Gulf products by pipe line from its refineries in Texas and Mississippi to a pipe line terminal at Atlanta, Georgia and then by tank trucks driven by Gulf employees to service stations, bulk plants and consuming accounts in Georgia. The issue was whether such tank truck drivers were within the §213(b)(1) exemption from the overtime pay provisions of the FLSA.

In *Galbreath*, as in this case, the volume and type of products shipped from the refinery was based on monthly forecasts computed by evaluation of service station requirements, contractual commitments and prior sales experience, 413 F.2d at 943, 944. Products were shipped from Gulf's refinery on a 10 day cycle, 413 F.2d at 944, and in this

case lake tanker shipments were made from Standard's refinery approximately weekly. As in the instant case, Gulf retained title to the product delivered to service stations until actually pumped and sold by the dealer, 413 F.2d at 943. The opinion in *Galbreath*, 413 F.2d at 944, states that one of the purposes of the terminal at Atlanta, Georgia "is to change the mode of transportation of petroleum products from pipe line to motor carrier" and the purpose of the Muskegon terminal of Standard in the instant case was to change the mode of transportation from lake tanker to motor carrier. In neither case was any specific portion of the products allocated until they arrived at the terminal from which they were delivered by tank truck. The projections of required supply at Gulf's Atlanta terminal were within 2% of the amount which subsequently was actually delivered in the month for which the projection was made, 413 F.2d at 944, while in the instant case the market varied a few gallons from Standard's projections of the required supply of product at its Muskegon terminal.

The Fifth Circuit in *Galbreath* held that the petroleum products were continuous moving in interstate commerce from Gulf's refineries in Texas and Mississippi until they reached the service stations, bulk plants and customers in Georgia, and that the truck drivers who delivered such products wholly within Georgia were subject to regulation by the Interstate Commerce Commission and, therefore, exempt from the overtime provisions of the FLSA under the Section 213(b)(1) exemption.

The Fifth Circuit in *Galbreath* relied upon *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, in which this Court, dealing with the applicability of the FLSA, established the "practical continuity of movement" test to determine the relationship of one-state activities to interstate commerce. The Fifth Circuit opinion pointed out, 413 F.2d at 945, that *Jacksonville Paper* involved three types of movements which were enumerated by the Sixth Circuit in *Allesandro v. C. F. Smith Co.*, 136 F.2d 75 as follows:

> "1) Goods purchased by the wholesaler upon order of a customer with the definite intention that they be carried at once to the customer.

2) Goods obtained by the wholesaler to meet the needs of specified customers pursuant to an understanding, though not for immediate delivery.

3) Goods based on anticipation of the needs of specific customers, rather than upon prior orders or contracts."

On the basis of the holding in *Jacksonville Paper* that the goods in categories 1 and 2 remain in interstate commerce until delivered to the retail customers and that goods in the third category could be held to remain in commerce "where there is a particularity of evidence to show that the goods in question are different from goods acquired and held by a local merchant for local disposition," the Fifth Circuit concluded, 413 F.2d at 945, that the petroleum products delivered to consuming accounts and service stations were in the second category of *Jacksonville Paper*, and that —

> "Even if the petroleum in question could be held not to fall within the second category, we would hold that it is in the third category and that it is in commerce because there is a particularity of evidence showing that the petroleum in question is different from goods acquired and held by a local merchant for local disposition. As in Mitchell v. C & P Shoe Corp. 286 F.2d 109 (5th Cir. 1960), we are not dealing with a merchant who offers his wares to the public at large. 68% of the petroleum is delivered to gas stations owned entirely by Gulf or whose equipment is owned by Gulf. In other words, Gulf is distributing to itself." 413 F.2d at 945, Footnote No. 5

In support of its decision the Fifth Circuit cited the Sixth Circuit decision in *Wirtz v. Lunsford*, 404 F.2d 693, 696, a case involving part of the same Gulf distribution system involved in *Galbreath*, in which the Sixth Circuit held:

> "It is our view that these products are in practical continuity of transit from the time they leave Gulf's facilities at Port Arthur, Texas until they are de-

livered to the intended customers in Tennessee, and the Knoxville storage tanks serve only as an intermediate step in that movement. Such is the holding in Walling v. Jacksonville Paper Co. * * * which we think is decisive on this issue."

The reliance of the Fifth Circuit in *Galbreath* upon this Court's decision in *Jacksonville Paper* and the Sixth Circuit's opinion in *Lunsford* makes the conflict between *Galbreath* and the decision in the instant case more complete. The Sixth Circuit in its opinion below did not even mention *Jacksonville Paper*, even though in *Lunsford*, the Sixth Circuit, on the basis of the holding in *Jacksonville Paper*, held that a movement of petroleum products, which even respondents agreed was almost identical with that involved in the instant case, remained in interstate commerce until the products were delivered to service stations. In *Lunsford*, Gulf products were transported by pipe line from Gulf's facilities in Texas to its bulk storage terminal at Knoxville, Tennessee, from which the products were transported to bulk plants of Gulf distributor-consignees in Tennessee and then delivered from such plants to Gulf service stations in Tennessee. The Sixth Circuit in *Lunsford*, 404 F.2d at 696, held that the truck transportation wholly within Tennessee was in interstate commerce on the grounds that the "products are in practical continuity of transit from the time they leave Gulf's facilities at Port Arthur, Texas until they are delivered to the intended customers in Tennessee."

The Sixth Circuit's opinion below avoids the consequences of its earlier decision in *Lunsford* by stating that "In Wirtz v. Lunsford . . . ., this Court never reached the issue of the scope of 'interstate commerce' under the MCA. The Court only held that the parties were engaged in interstate commerce as defined by the FLSA," p. 21a, Appendix B. Thus, the Sixth Circuit in this case is saying that although the transportation of Standard products by respondent truck drivers wholly within Michigan was part of a continuous interstate movement of such products for purposes of the FLSA, it was an intrastate movement for purposes of the MCA. This not only conflicts with *Galbreath* but

it also conflicts with the decisions of the Eighth Circuit in *Walling v. Mutual Wholesale Food & Supply Company*, 141 F.2d 331 and *Beggs v. Kroger Company*, 167 F.2d 700. In the *Mutual* and *Kroger* cases the Eighth Circuit held that what was interstate commerce for purposes of the FLSA; on the basis of this Court's decision in *Jacksonville Paper*, was also interstate commerce for purposes of the MCA and that drivers engaged in operations within a single state similar to those performed by respondents, except that property other than petroleum products was being transported, were engaged in interstate commerce and, therefore, within the 213(b)(1) exemption from the overtime provisions of the FLSA.

The Sixth Circuit in its opinion below relied upon the Report of the Interstate Commerce Commission in Ex-Parte MC-48, 71 MCC 17 (1957) in which the Commission set forth criteria for determining when the transportation of petroleum products by motor carriers within a single state was interstate commerce. This makes the conflict with *Galbreath* complete. On the basis of facts, which have already been shown to be substantially identical with the facts in this case, the Fifth Circuit held in *Galbreath*, 413 F.2d at 946 that "The Interstate Commerce Commission determination relative to transportation of petroleum products cited by plaintiffs, Ex-Parte MC-48 . . . is not applicable here."

The Sixth Circuit's opinion below and this Court's opinion in *Standard Oil Company v. Federal Trade Commission*, 340 U.S. 231 result in conflicting decisions with respect to the interstate character of two substantially identical movements of Standard's products within the same state — Michigan. In *Standard Oil Company v. Federal Trade Commission*, supra, 340 U.S. 237 Mr. Justice Burton stated the determining facts as follows:

> "Petitioner is an Indiana Corporation, whose principal office is in Chicago. Its gasoline is obtained from fields in Kansas, Oklahoma, Texas and Wyoming. Its refining plant is at Whiting, Indiana. It distributes its products in 14 middle western states, including Michigan. The gasoline sold by it in the Detroit, Mich-

> igan area, and involved in this case, is carried for petitioner by tankers on the Great Lakes from Indiana to petitioner's marine terminal at River Rouge, Michigan. Enough gasoline is accumulated there during each navigation season so that a winter's supply is available from the terminal. The gasoline remains for varying periods at the terminal or in nearby bulk storage stations, and while there it is under the ownership of petitioner and en route from petitioner's refinery in Indiana to its market in Michigan. 'Although the gasoline was not brought to River Rouge pursuant to orders already taken, the demands of the Michigan territory were fairly constant, and the petitioner's customers' demands could be accurately estimated, so the flow of the stream of commerce kept surging from Whiting to Detroit.' 173 F.2d at 213, 214. Gasoline delivered to customers in Detroit, upon individual orders for it, is taken from the gasoline at the terminal in interstate commerce en route for delivery in that area."

On the basis of the foregoing facts, Mr. Justice Burton concluded, 340 U.S. at 238:

> "Such temporary storage of the gasoline as occurs within the Detroit area does not deprive the gasoline of its interstate character."

Unless the above decision of this Court can be held inapplicable on the grounds that a continuous interstate movement performed partly by water and partly by tank truck is interstate commerce for purposes of the Robinson-Patman Act but not for purposes of the MCA, the Sixth Circuit's opinion below is clearly erroneous. At least one Federal Court has held that truck transportation within a single state, which is found to be interstate commerce by the Federal Trade Commission, is also interstate commerce for purposes of the FLSA and the MCA. *Gavril v. Kraft Cheese Company*, 42 F. Supp. 702 (ND 111, 1941). There clearly is nothing in the definition of "interstate commerce" in the MCA to support the conclusion that truck transportation within a single state that is part of a continuous interstate

movement for purposes of the FLSA is not also part of an interstate movement under the MCA.

On the second question involved, the Sixth Circuit in its opinion below held that the fact Wagoner was the holder of a Certificate issued to it by the Interstate Commerce Commission did not give the Commission power over its drivers and, as a result, exempt them from the FLSA. See pp. 22a and 23a, Appendix B. Even though Wagoner was holding itself out to transport shipments of petroleum products from Granger, Indiana, to points in Michigan and respondents were subject to being assigned to transport such shipments if Wagoner had been successful in obtaining them, the Sixth Circuit found that the District Court properly concluded that respondents were not subject to the jurisdiction of the Commission. See p. 23a, Appendix B. The decision of the Sixth Circuit on this question directly conflicts with the decisions of the Tenth Circuit in *Starrett v. Bruce*, 391 F.2d 320 (10th Cir. 1968); cert. den. 393 U.S. 971 (1968) and the three — Judge District Court in *General Transportation Co. v. U. S.*, 65 F. Supp. 981 (D.C. Mass. 1946), aff'd. per curiam, 329 U.S. 668 (1946).

In *Bruce*, the Tenth Circuit held that a truck driver employed by a motor carrier was subject to the jurisdiction of the Interstate Commerce Commission and excluded from coverage by the FLSA, even though the motor carrier performed no interstate transportation during the period of the truck driver's employment and held no authority to perform interstate transportation. The Tenth Circuit found that the motor carrier "held himself out to the general public as being available for interstate hauls and actively solicited interstate business", 391 F.2d at 323, and was, therefore, a common carrier by motor vehicle as defined in the MCA, 49 U.S.C. §303(a)(14). It then held that because the driver was subject to being assigned to an interstate trip if the motor carrier had been successful in obtaining the interstate shipments sought, such driver was subject to regulation by the Interstate Commerce Commission under §204 of the MCA, 49 U.S.C. §304.

The Court in *General Transportation Co.*, supra, 65 F. Supp. at 985, held that "Possession of a Certificate, in and of itself, without performance of any transportation constituted the holder thereof a motor carrier subject to Part II" [of the Interstate Commerce Act]. Under that decision, Wagoner was a common motor carrier subject to the MCA, not just by reason of its holding out as in *Bruce*, but by reason of the fact that it was the holder of a Certificate issued to it by the Interstate Commerce Commission. Respondents, therefore, were employees of a motor carrier subject to the MCA and, as drivers subject to being assigned to transport shipments of petroleum products from Granger, Ind., to points in Michigan that Wagoner was authorized and holding itself out to transport, they were, under the Tenth Circuit's decision in *Bruce*, regulated by the Interstate Commerce Commission and exempt from the FLSA.

The District Court below recognized the conflict with *Bruce* saying: "We recognize that there are cases — and particularly *Starrett v. Bruce*, which has been cited by counsel, which are in opposition to the conclusion which this Court reaches on the facts. That does not change the conclusion which this Court has reached, and until a contrary conclusion is required by a decision of the Court of Appeals for this circuit, we decline to follow that case." p. 5a, Appendix A. However, the Sixth Circuit, in its opinion cited *Bruce* without commenting on the conflict between its decision and the decision in *Bruce*. See p. 22a, Appendix B.

These conflicts justify the grant of certiorari to review the opinion and the judgment against petitioners below.

2. The Decision Below Raises Significant And Recurring Problems.

Petroleum products are distributed throughout the entire United States, partly by rail, pipe line or water and partly by either private or for hire motor carriers, with the use of tank terminals for the purpose of transferring products from one mode of transportation to another. The

decision of the Sixth Circuit in this case, therefore, raises problems throughout the country, which should be resolved by a review of the opinion of the Sixth Circuit below.

There is the problem as to how tank drivers are to be compensated when they are engaged in transporting within a single state petroleum products that have been moved into the state by rail, pipe line or water, which now may vary depending upon the judicial circuit in which they are employed. More important, there is the problem as to whether such drivers and the equipment operated by them are subject to the federal requirements with respect to the qualifications of drivers and safety of operators and equipment. Under the decision of the Sixth Circuit in this case, respondents and all other drivers similarly employed in the Sixth Judicial Circuit, as well as the equipment operated by them, would not be subject to the regulations under the MCA designed to promote safe operations of trucks on the nation's highways. The opposite conclusion would follow from the decisions of the Fifth, Eighth and Tenth Circuits discussed herein, leaving only uncertainty in the areas of the other judicial circuits.

CONCLUSION

For the reasons set forth herein, a writ of certiorari should issue to review the judgment against petitioners and the opinion of the Sixth Circuit in this case.

Respectfully submitted,

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July 9, 1970

APPENDIX A

(1)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Archie Baird, Herman Bushman, et al.,
Plaintiffs.

v.

Wagoner Transportation Company,
and Harold Wagoner,
Defendants.

Civil Action
No. 5276

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(2)

THE COURT: There seems to be little, there seems to be very little, in the way of an issue of fact in this case. As a matter of fact, there seems to be no argument about most of the facts except as to the issue as to the good faith of the defendant, if that issue is reached.

It is conceded that the plaintiffs were, at the inception of this suit, employed by the defendant. Some have since been terminated, which is a matter with which we are not now concerned.

This lawsuit covers the period from March 23, 1964, to and including November 15, 1967. It is conceded that during that time the defendant did not pay any overtime to any driver involved as a plaintiff in this case if the driver worked more than 40 and less than 48 hours in any one week.

It is conceded and stipulated that any driver who worked more than 48 hours was paid time and a half in accordance with the union agreement which was in effect during the period to which the Court has made reference.

It has been stipulated that the defendant is subject to the provisions of the Fair Labor Standards Act, Wage and Hour Provisions, unless the defendant comes within (3) the exception provided by Section 213(b)(1) of Title 29 of the United States Code Annotated, which exception provides, in part, that Section 7 of the act does not apply to "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49."

Now, Section 7, to which reference is made, is the overtime provision; and, during the period applicable, provided that, in part:

> "Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

The basic issue in this case is whether the petroleum products of the Standard Oil Company or American Oil Company — and we will refer to it as Standard Oil Company, for purposes of convenience — retain their (4) interstate character in the movement from the refinery at Whiting, Indiana, to the marine terminal at Muskegon, Michigan, to the company bulk plants, company service stations, and ultimate consumers, until they come to rest at the bulk plants, ultimate consumers, or gasoline stations.

This whole matter has been before the interstate Commerce Commission in a matter entitled, "Determination of Jurisdiction over Transportation of Petroleum and Petroleum Products by Motor Carriers within a Single State," reported as Ex Parte No. MC-48, 71 M.C.C. 17, in 1957.

On page 29 of the commission's report, the commission stated that:

"In determination the essential character of the commerce" — that is, whether it is interstate or intrastate in nature — "the factor most often relied on is the fixed and persisting transportation intent of the shipper at the time of shipment. . . . The major manifestations of this intent . . . may be the following: (1) At the time of shipment there is no specific order being filled for a specific quantity of a given product to be moved through to a specific destination beyond the terminal storage, (5) (2) the terminal storage is a distribution point or local marketing facility from which specific amounts of the product are sold or allocated, and (3) transportation in the furtherance of this distribution within the single State is specifically arranged only after sale or allocation from storage."

Now, it appears, in this case, that the Standard Oil Company, American Oil Company, has a very sophisticated method of projecting its potential business, much more sophisticated than the ordinary retailer. And the oil company is a retailer. It projects on a five-year basis; it projects again on a one-year basis; and, according to the testimony, revises the projections as required in accordance with developments in the area served by any specific terminal facility.

So I think that it is fair to assume that the projections made in the central office in Chicago or Whiting, as the case may be, will be substantially affected by weather conditions, by manufacturing conditions, by possible or actual strikes, which may substantially affect production of materials wherein petroleum products are necessary to maintain production.

(6)

All of these matters will undoubtedly be considered, not perhaps on the five-year projection, and to a limited degree on the one-year projection, and certainly in any revision they will be considered very, very carefully.

In any event, the oil company, through its projection, makes available in the Muskegon marine terminal a sufficient amount of the several petroleum products to fill the con-

tracts and orders obtained by the sales department; and what it does is project the success or lack of success of the sales department on a future basis. Deliveries from the marine terminal are made on instructions through the sales department to the terminal, or, where there has been a prior method of delivery established, by information in regard to the quantity on hand at any specific location, whether it be bulk plant or ultimate consumer or gasoline station, with an obligation to maintain a reasonably adequate level of supply.

Wagoner Transportation has furnished to it for its use in arranging for transportation facilities, copies of the projected deliveries from the Muskegon marine terminal. Wagoner Transportation does not know, until it receives its orders from Standard Oil Company, what deliveries it is to make, it does not know what quantities (7) it is to deliver to any specific location, except as it may learn that information other than by official information furnished to it.

The facts recited effectively distinguish this case from the Stang case, which is unreported but which was decided by this Court in the Northern Division.

In the Stang case, there was a contract between the oil company and the ultimate consumer which covered more than 90 per cent of the deliveries into the marine terminal; and the trucks in question were maintained basically for the purpose of moving the oil in question — that is, the petroleum product in question — from the marine terminal at Marquette to the several pelletizing plants in the Marquette range, iron range, all pursuant or practically all pursuant to a single contract between the oil company and Cleveland Cliffs Iron Company.

In this case, Mr. Gary, of the oil company, made the effort to locate the number of customers involved: 70 bulk plants; 70 service stations who were supplied on a regular basis, on a metered basis, where they paid for only that which they sold; seven C.O.D. service stations where they paid for the material as received; and 125 consumers, ultimate consumers; and 70 to 75 per cent of the petroleum (8) products were provided to the bulk plants and service stations, and 25 to 30 per cent to the ultimate consumers.

No portion of any of the products had been allocated before they arrived in the Muskegon terminal. It was estimated that each of them would use an unknow quantity; whereas, in the Stang case, more thn 90 per cent of the petroleum products shipped to Muskegon were, at the time of original shipment, destined to arrive in the tanks of the several pelletizing plants. And while there was some comingling of goods, it was nominal, in that the percentage delivered under the Cleveland Cliffs contract was so big that the comingling was of no consequence.

As pointed out by Judge Neese in Wirtz v. Lunsford:

> "The petroleum products transported through the pipeline in question are fungible goods which lose their identity as interstate commerce when at rest in the terminal storage tanks at Knoxville, and that subsequent transportation of these products within Tennessee thereafter by Messrs. Lunsford and Thomas, respectively, is intrastate commerce," with citation of cases.

We recognize that there are cases — and (9) particularly Starrett v. Bruce, which has been cited by counsel, which are in opposition to the conclusion which this Court reaches on the facts. That does not change the conclusion which the Court has reached, and until a contrary conclusion is required by a decision of the Court of Appeals for this circuit, we decline to follow that case.

We recognize that in other connotations, "interstate commerce" may have a different meaning. But as pointed out by Justice Frankfurter in Kirschbaum Co. v. Walling, 316 U.S. 517, at pages 520 and 521:

> "The body of Congressional enactments regulating commerce reveals a process of legislation which is strikingly empiric. The degree of accommodation made by Congress from time to time in the relations between federal and state governments has varied with the subject matter of the legislation, the history behind the particular field of regulation, the specific terms in which the new regulatory legisla-

> tion has been cast, and the procedures established for its administration. . . . Thus, while a phase of industrial enterprise may be subject to control under the National Labor Relations Act, a different phase of the same enterprises may not come within the (10) 'commerce' protected by the Sherman Law. . . . Similarly, enterprises subject to federal industrial regulation may nevertheless be taxed by the States without putting an unconstitutional burden on interstate commerce."

And as pointed out by the Sixth Circuit Court of Appeals in Fletcher v. Grinnell Bros., 150 F.2d 337, at page 340, a 1945 decision:

> "With respect to the construction of the Fair Labor Standards Act, where that is found to be necessary, the court must assume that all employees in interstate commerce, so far as reasonably possible, should be made subject to the provisions of the statute, and exemptions should be strictly construed." Citing cases. "The Act must be liberally construed to include all employees not expressly excepted therefrom who reasonably may be deemed within its purview."

Under the circumstances of this case, we are satisfied that, despite the several cases cited, including the decision of this Court in Heckle v. Stang Michigan Corporation, the petroleum products involved in this case came to rest when they arrived in Muskegon, and they lost their identity in the marine terminal facility of the oil (11) company at Muskegon.

As pointed out by Mr. Gary, the oil company had an active sales force which was busily engaged in trying to sell that which was in Muskegon and that which was destined to be in Muskegon, and the company was in position to make a change in potential deliveries, so that they could make a delivery or attempt to make a delivery at any time that a proper customer appeared.

Under those circumstances, there was no identity, in this Court's opinion, between the product shipped to Mus-

kegon and the product transported by the defendant company.

We recognize that the defendant company had interstate authority from the Interstate Commerce Commission. It had not been utilized at any time, so far as we can determine, from the time the authority was granted until the trial of this lawsuit. It certainly had not been utilized from 1959, when Mr. Morse went with Wagoner Transportation, and has not been utilized since that time.

Mr. Morse pointed out that he had kept the oil company aware of the fact that interstate authority was available, and that Wagoner Transportation was in a position to furnish transportation from Indiana to Michigan.

(12)

I am sure that even counsel for the defendant in this case would abandon any claim in regard to the authority from Escanaba or the authority from Kewaunee as applicable to the drivers in Muskegon.

Which leaves us with the issue of whether or not the plaintiffs are entitled to liquidated damages in the amount of double the amount which they are entitled to recover.

The Court has concluded, on the facts stated and found, that the plaintiffs are entitled to recover for those payments not made on a basis which is understood by all counsel and the Court, and which the Court finds difficult to put in words, but the overtime payments for the period between 40 hours and 48 hours worked during the period from March 23, 1964, to November 15, 1967.

The Court finds, as a matter of law, that Wagoner Transportation Company was not engaged in interstate commerce and subject to the I.C.C. regulations under the exception provided by Section 213(b)(1) of Title 29.

The mere fact that it had interstate authority which it had not exercised is not, in the opinion of this Court, sufficient, standing alone and without exercising the authority, to bring the entire enterprise of Wagoner (13) Transportation within the authority of the Interstate Commerce Commission and thereby provide an exemption contrary to the intent of the Fair Labor Standards Act.

On liquidated damages, if the employer, under Section 16(b) of the Fair Labor Standards Act, 29 U.S.C.A., Section 216(b), acts in good faith in failing to pay overtime, then there is no violation of the act and there can be no liquidated damages. The employer is required to pay only the overtime pay.

In this case, it appears without any question that it was accepted practice in the industry, up to January of 1965, if I have the date correct, and I believe that is correct, to pay straight time for 48 hours; and the contracts were negotiated on that basis. By contracts, I make reference to the contracts between the haulers and the Teamsters Union.

A new contract was negotiated in 1964. It provided for 48 hours of work before overtime should be paid except in certain circumstances to which reference was made by Mr. Miedema.

The Wage and Hour Division made a claim to the employer in January, 1965, or about that date, that there was a violation.

(14)

It would appear that the Wage and Hour Division made no effort to enforce its claim of any alleged violation for somewhat over a year, at least. I could readily understand its abandoning any claim if it knew of the commencement of this lawsuit. But the Wage and Hour Division, at least, was not so completely satisfied of the propriety of its position that it took any steps to force the employer to comply.

And I think the answer to the whole claim of any bad faith on the part of the employer is the fact that this is not an easy lawsuit, and that neither counsel for the plaintiff, counsel for the defendant, or the Court could have predicted one week ago exactly how this lawsuit would come out. And any employer who is in that situation is not acting in bad faith if he thinks he is sufficiently right to come in here and put before the Court the kind of a lawsuit which was placed in front of the Court in this instance.

In other words, the employer acted on the advice of competent counsel. I don't find any evidence that the employer or the counsel were in any sense unreasonable. And in a case which appeared to be similar, at least, to this one — and by "appeared," I mean appeared to (15) counsel for the defendant to be similar — the employer prevailed.

I am satisfied that the employer, the defendant in this case, has maintained the burden of establishing that the employer was acting in good faith. It apparently was a subject of negotiation, and whether or not the general legal issue has ever been resolved is of no consequence. It appears that it was of sufficient doubt so that it required negotiation in order to reach a conclusion.

So the plaintiffs are not entitled to liquidated damages.

You may draft the necessary judgment, and I am sure you will need some accounting figures before it can be drafted, Mr. Bransdorfer; and you and Mr. Butler can work those out.

MR. BRANSDORFER: We shall, Your Honor.

May I make reference to one further matter?

THE COURT: Yes, of course.

MR. BRANSDORFER: As the Court is aware, the act also provides, within the Judge's discretion, that attorneys' fees may be granted.

We have brought with us our time records maintained by our bookkeeping department which were summarized through yesterday. There has been a tremendous amount of time involved, as the Court can appreciate from the briefs and the nature of the case.

I am at your suggestion as to whether you would like that information presented to you now, or simply forwarded to you, with copies to counsel, so that the Court, at the time the judgment is submitted, may review that matter.

THE COURT: Mr. Butler?

MR. BUTLER: Your Honor, I think that the payment of attorneys' fees is equated the same as liquidated damages, and attorneys' fees are sort of a concomitant.

I would submit to the Court, although I never like to

argue against the payment of attorneys' fees, being one myself —

THE COURT: You are not arguing against their payment; you are just arguming about who is going to pay them.

MR. BUTLER: Yes, Your Honor, that is correct. I would submit that the beneficiaries in this case should compensate their attorneys, because I don't think there has been sufficient bad faith shown to require payment by the defendant.

(17)

THE COURT: I have my doubts, Mr. Bransdorfer, unless you can show that you are entitled to attorney fees.

All of these drivers were paid in accordance with the union agreement, to which they were parties. Now, during the course of it they concluded that, as a matter of law, they were entitled to further compensation. And I have no doubt — and I think it affirmatively appears from the record — that the agreement was negotiated on an arm's-length basis.

If we were to follow your suggestion, is there any reason why the employers shouldn't have to pay the union personally for negotiating the contract which brought them within the provisions of the Fair Labor Standards Act? It is the same thing.

MR. BRANSDORFER: Your Honor, the legislation, as the Court knows, was remedial. And I am sure that, based on the cases that have involved this point, the purpose of the court having authority within its discretion to award attorneys' fees was to permit those who were intended under the act to benefit, to reap the full benefits, apart from liquidated damages.

And I think it is discretionary with the (18) court, and I think that a showing can be made in this case, based upon the large amount of time involved, that this is a very appropriate case, because of the complex nature of it.

THE COURT: All right. You work out your judgment. And you may file a brief on this issue and make available a copy of the brief to Mr. Butler so that he will

have an opportunity to file a reply brief. And I have no desire to cut you off, Mr. Bransdorfer, but I think it should be briefed, and briefed carefully.

MR. BRANSDORFER: Thank you, Your Honor.

THE COURT: I will tell you now that unless the brief is very convincing, I am not satisfied that you are entitled to attorney fees in this case.

All right, we will adjourn.

* * *

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(1)

OPINION

In this action the plaintiffs recovered back pay and now demand attorney fees under the provisions of the Fair Labor Standards Act of 1938, *29 U.S.C.A. § 216(b), as amended, 29 U.S.C.A. § 260.*

It is agreed by counsel that the court is required to assess attorney fees in such amount as the court shall deem reasonable. *Wright v. Carrigg*, 275 F.2d 448, (4th Cir., 1960); *Birbalas, et al v. Cuneo Printing Industries, Inc.*, 140 F.2d 826, (7th Cir., 1944); *Dumas v. King*, 157 F.2d 463, (8th Cir., 1946); *Rural Fire Protection Company v. Hepp*, 366 F.2d 355 (9th Cir., 1966). It was agreed by counsel that the reasonableness of the attorney fees to be assessed is a matter within the sound discretion of the court in which all relevant factors should be considered. *Bable v. T. W. Gas and Oil Co.*, 287 F.2d 21 (3rd Cir., 1961); *Michigan Window Cleaning Co. v. Martino*, 173 F.2d 466 (6th Cir., 1949).

Counsel for the plaintiffs have furnished an itemized statement of the time expended in the case, but recognize that while they have expended a tremendous amount of time in the preparation for the trial of this case and the preparation of the briefs, as well as the investigation of the facts, the court is not bound to accept the detailed statement of time as necessarily representative of that which

should reasonably be required in a matter of this nature. The court recognizes, as claimed by the plaintiffs, that much time was necessarily devoted to an analysis of defenses pleaded by the defendants but not asserted on the trial of the case. The intention to abandon these defenses was not communicated to plaintiffs' counsel at any time prior to trial, placing upon counsel for the plaintiffs the obligation to be prepared to meet the defenses as a matter of fact and as a matter of law.

Where defenses were asserted in the pleadings and in the course of the pre-trial conferences and not asserted in the trial, counsel for the defendants may not be heard to complain that that time devoted by plaintiffs' counsel in the analysis of the facts and the law relating to such defenses should not be compensated. Counsel for the defendants suggest that plaintiffs' counsel should be limited in the amount of attorney fees allowed by the amount of time devoted to the file and the amount of compensation paid to the attorneys for the defendants. This reasoning is completely fallacious because all of the facts were at all times in the possession of the defendants and counsel for the defendants had exclusive knowledge as to the defenses which they intended to assert in the course of the trial.

The total amount of the judgment recovered by counsel for the 19 plaintiffs is in the amount of $31,531. The minimum fee schedule promulgated by the State Bar of Michigan fixes a minimum hourly rate of $30.00 for attorneys work in the preparation of the facts and the preparation of the briefs in a lawsuit. This court does not consider that this is a case of such a nature nor are counsel so inexperienced that they should be required to work for the "minimum" fee. On the other hand the court does not consider itself to be bound to reimburse counsel for the plaintiffs for each and every hour devoted to the case in question.

After due consideration of all of the factors, including the detailed statement of the hours devoted to the case by counsel for the plaintiffs, it is this court's considered judgment that a reasonable fee for the work done by counsel for the plaintiffs is $12,500, with costs to be taxed in accordance with the statutes and rules. The court recognizes

that this is a substantial fee but also recognizes that this is a substantial case resulting in a substantial judgment which required additional work because of the defenses asserted on behalf of the defendants.

A judgment will be entered accordingly.

Dated: February 20, 1969.

(s) W. Wallace Kent
Chief Judge

(SEAL)

APPENDIX B

(1)

Nos. 19570 and 19571

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ARCHIE BAIRD, ET AL.,
Plaintiffs-Appellees and Cross-Appellants.

v.

WAGONER TRANSPORTATION COMPANY, ET AL.,
Defendants-Appellants and Cross-Appellees.

APPEAL from the United States District Court for the Western District of Michigan.

Decided April 17, 1970.

Before: CELEBREZZE and McCREE, Circuit Judges, and WILSON*, District Judge.

CELEBREZZE, Circuit Judge. This is an appeal from the United States District Court for the Western District of

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*Honorable Frank W. Wilson, District Judge, E. D. Tennessee, sitting by designation.

Michigan in an action by 19 Wagoner Transportation truck drivers against Wagoner, pursuant to the Fair Labor Standards Act of 1938, *as amended* in 1961, 29 U.S.C. § 201 et seq. (1964) [hereinafter sometimes referred to as "FLSA"]. The case was tried without a jury and the facts were generally uncontested. The parties stipulated that Wagoner was an "enterprise engaged in commerce within the meaning of Section 3(s) of the Act," 29 U.S.C. § 203(s); and that (2) Wagoner had not paid for and would be liable under the FLSA for certain overtime work which the drivers had done over several years, unless Wagoner was exempted from the maximum hours provisions of the FLSA, 29 U.S.C. §§ 213(b)(1), 216(b)(1). The District Court held that the 19 Wagoner truck drivers were not exempted from the maximum hours provision of the FLSA and awarded them overtime back pay, counsel fees and costs, but denied their claim for liquidated damages. Wagoner appeals and its 19 truck drivers cross-appeal for liquidated damages. 29 U.S.C. §§ 216(b), 260.

Appellant is a motor carrier for hire engaged in the transportation of petroleum products, in bulk, in tank vehicles. At all times herein relevant, Appellant transported petroleum products for a wholly-owned subsidiary of Standard Oil of Indiana [hereinafter "Standard"]. For the past ten years, including the period involving, none of Appellant's drivers ever transported petroleum products outside the State of Michigan, although Appellant did have a dormant Certificate of Public Convenience and Necessity authorizing it to transport petroleum and petroleum products from Granger, Indiana to points in Michigan.

Standard ships its oil to its Muskegon terminal on the basis of highly sophisticated forecasts of its customers' needs. Statistical projections never being precisely accurate, if Standard mis-estimates its customers' actual needs, Standard borrows or buys petroleum from its nearby competitors to fill the orders.

All customer orders are placed with Standard's sales department, which informs the terminal manager and Wagoner of the quantities and destinations of the various petroleum products which are to be delivered to points

within Michigan from the Muskegon terminal. Standard gives copies of its forecasts to Wagoner so that Wagoner will have equipment available to handle actual orders. While the evidence did not reveal the average amount of time the petroleum products are in "inventory" pending the receipt of actual orders, (3) Standard acknowledges that the "through-put" of the Muskegon terminal in any given year is about six times its tank capacity. If the terminal tanks were, on the average, one-half full, then petroleum products in the Muskegon terminal would be inventoried for an average length of one month.

Standard has more than 200 customers in the Michigan area served by the Muskegon terminal and Wagoner, under a variety of financial arrangements. Direct shipments to industrial plants and schools compose about 25 to 30 per cent of the shipments from the Muskegon terminal. Sales to some 77 service stations and 70 Standard bulk plants comprise the remaining 70 to 75 per cent of the shipments. The actual method of ordering varies: some customers have requirements contracts; others call each time they want an order; some are regular customers (including its own bulk plants) whose supply is maintained at a level by Standard; while a few customers order on an infrequent and irregular basis. Although Standard knows the identities of all its customers at the time it makes shipments to Muskegon, it does not know precisely the amount of petroleum each customer will actually order.

The sole issue on this appeal is whether the Appellants, who otherwise admit they are covered by the Fair Labor Standards Act, are excluded from its maximum hours provision by Section 13(b)(1) of the Act, 29 U.S.C. § 213(b)(17) (1964).

The FLSA provides that any employee who "is engaged in commerce or in the production of goods for commerce" shall be paid a minimum of "one and one-half times the regular rate at which he is employed" for every hour over 40 hours he works in a workweek. However, an employee is exempted from the benefits of this provision if he is

"(b)

. . .

> (1) Any employee with respect to whom the Interstate Commerce Commission has power to establish (4) qualifications and maximum hours of service pursuant to the provisions of Section 304 of Title 49 (The Motor Carriers Act of 1935)." 29 U.S.C. § 213 (b) (1).

The Motor Carriers Act of 1935, 49 U.S.C. § 301 et seq. [hereinafter sometimes referred to as MCA] extends the power of the Commission to "motor carriers engaged in interstate . . . commerce." 49 U.S.C. § 302(a). "Interstate commerce" is defined under the MCA as

> "(10) . . . commerce between any place in a state and any place in another state or between places in the same state through another state, whether such commerce moves wholly by motor vehicle, or partly by motor vehicle and partly by rail, express, or water." 49 U.S.C. § 303(10).

Thus, the Interstate Commerce Commission has the "power to establish qualifications and maximum hours of service" for truck drivers only if they are engaged in "interstate commerce" for purposes of the MCA.

While the parties have stipulated that they are engaged in "interstate commerce" for the purposes of the FLSA, such stipulation does not necessarily require a conclusion that their activities were in "interstate commerce" for the purposes of the MCA. The scope and meaning of "interstate commerce" in each Congressional Act presents a "unique problem in which words derive vitality from the aim and nature of the specific legislation." *Federal Trade Commission v. Bunte Brothers*, 312 U.S. 349, 351 (1940). Whereas the FLSA covers employees "engaged in commerce or in the production of goods for commerce" 29 U.S.C. §§ 203, 207(a)(1), the MCA only covers employees actually "part of a continuous movement in interstate commerce." *Shew v. Southland Corporation (Cabell's Dairy Div.)*, 370 F.2d 376, 380 (5th Cir. 1966). Whereas the former Act would apply to employees "in the production of goods for commerce" even though such (5) employees handled or sold such goods prior to or after their actual

"continuous movement" in interstate commerce, the MCA would not. *Galbreath v. Gulf Oil Corporation*, 413 F.2d 941 (5th Cir. 1969). 29 U.S.C. § 203(s).

This Court must determine whether the Appellees are employees over whom the Interstate Commerce Commission has power under the MCA. *Morris v. McComb*, 332 U.S. 422 (1947). If Appellees are within the Commission's power, as defined in the MCA, they are exempted from the maximum hours provisions of the FLSA and not entitled to recovery for overtime. *Levinson v. Spector Motor Service*, 330 U.S. 649 (1947).

The Interstate Commerce Commission, after years of extensive hearings (1955-1957), issued industry-wide guidelines to indicate when the transportation of petroleum and petroleum products by motor carriers within a single state is interstate commerce. *See Ex Parte No. MC-48*, 71 MCC 17 (1957). The criteria used in *Ex Parte No. MC-48* were incorporated into an interpretive Bulletin of the Wage and Hour Division, United States Department of Labor outlining the scope of the 13(b)(1) exemption to the FLSA. Code of Federal Regulations § 782.7(b)(2) provides:

> "(2) The Interstate Commerce Commission has held that transportation confined to points in a single State from a storage terminal of commodities which have had a prior movement by rail, pipeline, motor or water from an origin in a different State is not in interstate or foreign commerce within the meaning of Part II of the Interstate Commerce Act if the shipper has no fixed and persisting transportation intent beyond the terminal storage point at the time of shipment. See Ex parte No. MC-48 (71 M.C.C. 17, 29). The Commission has specifically found that there is no fixed and persisting intent where (i) at the time of shipment there is no specific order being filled for a specific quantity of a given product to be moved through to a specific destination beyond the terminal storage and (6) (ii) the terminal storage is a distribution point or local marketing facility from which specific amounts of the product are sold or allocated, and (iii) transportation in the furtherance of this dis-

> tribution within the single State is specifically arranged only after sale or allocation from storage. While Ex parte No. MC-48 deals with petroleum and petroleum products, the determination indicates that the same reasoning applies to general commodities moving interstate into a warehouse for distribution (71 M.C.C. at 27). Accordingly, employees engaged in such transportation are not subject to the Motor Carrier Act and therefore not within the section 13(b)(1) exemption. They may, however, be engaged in commerce within the meaning of the Fair Labor Standards Act."

The United States Supreme Court has held that where the United States Department of Labor and the Interstate Commerce Commission construe the FLSA and the MCA consistently, their construction "is entitled to great weight." *Boutall v. Walling*, 327 U.S. 463, 471 (1946) (involving prior consistent agency interpretation of § 13(b)(1). *See United States v. American Trucking Association*, 310 U.S. 534, 549 (1940). The District Court applied the agency criteria in *Ex Parte No. MC-48* and properly accorded it "great weight."

In *Ex Parte No. MC-48*, the Commission specifically indicated that truck drivers are not engaged in "interstate commerce" under the MCA and not subject to the jurisdiction of the Commission where the following three factors are present: (1) "specific orders" of a "specific quantity" to be moved to a specific customer; (2) the use of the terminal storage as a "local marketing facility" from which products are "sold or allocated;" and (3) transportation in the furtherance of such "distribution within a single state is specifically arranged only after sale or allocation from storage."

Each of these three factors is present in the instant action. First, the District Court found that Standard shipped to the Muskegon terminal on the basis of sophisticated (7) forecasts and that Standard knew each of the customers who would ultimately be served by that shipment, but that the "specific quantity" to be shipped to a given des-

tination was not fixed at the time of shipment. Many of Standard's accounts might, in fact, order substantially more or substantially less than was "forecasted" to them by the Standard sales department.

Second, although the District Court observed that Standard did not use the terminal as a retail outlet for petroleum products or in the processing of petroleum products, we find that it may properly be characterized as a "local marketing facility" insofar as the "through-put" of petroleum products was only six times the storage capacity of the terminal and the goods at the terminal were inventory-in-store for actual orders to be placed by Standard's customers. As the District Court summarized:

> "'No portion of any of the products had been allocated before they arrived in the Muskegon terminal. [Each forecasted Standard customer] would use an unknown quantity."

Third, the record reveals that no final transportation arrangements were made until after the petroleum products were inventoried at Muskegon. While Appellants received copies of Standard's forecasts so as to be able to estimate the amount of equipment to be required at the Muskegon terminal, the arrangements for the transportation of a particular quantity of product to a particular destination were made only after an actual customer order was received. Actual orders, not forecasts, were used as the basis for "allocation from storage."

Based on these three factors, we agree with the District Court that the Appellee drivers were not engaged in "interstate commerce," as defined by the MCA and *Ex Parte No. MC-18*.

The four cases relied upon by Appellants are distinguishable. (8) *Wirtz v. Lunsford*, 404 F.2d 693 (6th Cir. 1969), *Galbreath v. Gulf Oil Corporation*, 413 F.2d 941 (5th Cir. 1969), *Shew v. Southland Corporation*, 370 F.2d 376 (5th Cir. 1966), and *North Carolina Utilities Commission v. United States*, 253 F.Supp. 930 (E.D. N.C. 1966).

None of these cases involves the combination of intrastate factors involved in the instant case. It must be noted that in the instant case forecasts, not actual orders by customers, were the basis of the shipments of petroleum products from Whiting, Indiana to Muskegon, Michigan. Further, such forecasts merely reflected the anticipations of customers' needs because Standard had not entered into "requirements contracts" or "specific quantity" arrangements before shipping to the Muskegon terminal. Also, Standard's occasional need to buy or borrow petroleum from nearby competitors to fill customers' orders indicates the "inventory" status of the goods at the terminal. Finally, the low "through-put" of the Muskegon terminal suggests that the products stored there "come to rest" before being delivered to Wagoner's drivers for transportation wholly within Michigan.

In *Wirtz v. Lunsford, supra*, 404 W.2d 693 (6th Cir. 1969), upon which the Appellants rely, this Court never reached the issue of the scope of "interstate commerce" under the MCA. The Court only held that the parties were engaged in interstate commerce as defined by the FLSA. 404 F.2d at 696, a fact which is conceded by the parties to this action.

In *Galbreath v. Gulf Oil, supra*, 413 F.2d 941 (5th Cir. 1969), the United States Court of Appeals for the Fifth Circuit found when Gulf Oil Company shipped its products from out of state it had a fixed and persisting intent to transport beyond the bulk plant on the "basis of contractual commitments with customers." Shipments were "predetermined" and products were shipped on a 7-10 day cycle with no more than 15 days storage supply held in the bulk plant at any one time. These facts are inapposite to the instant action in which (9) the specific quantities of customer orders were not "predetermined" and the terminal was used more in the nature of a storage or inventory facility.

Similarly, reliance upon *North Carolina Utilities Commission v. United States, supra*, 253 F.Supp. 930) and *Shew v. Southland Corporation, supra*, 370 F.2d 376 (5th Cir. 1966), is misplaced because these two cases involved

shipments made with a fixed intent of continuous movement, 253 F.2d at 936, or "pursuant to pre-existing orders," 370 F.2d at 380, and remained in the terminal facilities or storage area for "not more than three days," 253 F.Supp. at 936, or "less," 370 F.2d at 380. Unlike the procedures at Muskegon, the products were not held in storage or inventory pending the receipt of actual orders.

Indeed, each of the four cases relied upon by Appellants acknowledges the "great weight" to which the Commission's decision in *Ex Parte No. MC-48* is entitled, and applied essentially the same criteria used by the District Court in this action.

Appellant makes a final contention that its mere possession of a dormant Interstate Certificate of Public Convenience and Necessity gives the Interstate Commerce Commission power over its employees, and, as a result, exempts them from the FLSA. 29 U.S.C. §§207, 213 (b) (1). The power of the Interstate Commerce Commission to exercise jurisdiction over a carrier's employees is limited to "activities [which] directly affect the safety of operation . . . in interstate . . . commerce." *Levinson v. Spector Motor Co.*, 330 U.S. 649, 671 (1947); *Pyramid Motor Corp. v. Ispass*, 330 U.S. 695, 708 (1947); *United States v. American Trucking Assns.*, 310 U.S. 534, 553 (1940).

The District Court found as a fact that Wagoner "had not utilized since 1959" its authority to engage in interstate transportation of petroleum products under its Certificate of Convenience. This period of disuse began five years prior to the period under contention and carries through to the present. (10) Since 1959, all drivers in Wagoner's employ have driven on intrastate routes granted by the Michigan Public Service Commission. Upon such facts, we find no merit in Appellant's contention that its possession, without any use for several years prior and throughout the period under contention, of an interstate certificate gives the Interstate Commerce Commission jurisdiction over its drivers. *See Goldberg v. Faber Industries*, 291 F.2d 232 (7th Cir. 1961); *Starrett v. Bruce*, 391 F.2d 320 (10th Cir. 1968), *cert. denied* 393 U.S. 971.

We find that the District Court properly concluded that the truck drivers were engaged in transportation which was wholly intrastate in character *as defined by the MCA*. We further find the District Court properly concluded that the instant truck drivers were not subject to the jurisdiction of the Commission as defined in the MCA; and hence, these drivers are entitled to the beneficial provisions of the FLSA. The Appellees' cross-appeal for liquidated damages is denied for the reasons stated by the District Court. The judgment of the District Court is affirmed.

JUDGMENT

No. 19570

BEFORE: CELEBREZZE and McCREE, Circuit Judges and WILSON, District Judge.

APPEAL from the United States District Court for the Western District of Michigan

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Each Party to pay its own costs on appeal.

Entered by order of the Court.

(s) Carl W. Reuss
Clerk

JUDGMENT

No. 19,571

BEFORE: CELEBREZZE and McCREE, Circuit Judges and WILSON, District Judge.

APPEAL from the United States District Court for the Western District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Each Party to pay its own costs on appeal.

Entered by order of the Court.

(s) Carl W. Reuss
Clerk